Alabama,[31] Kansas,[32] Oregon,[33] Missouri,[34] Virginia,[35] Iowa,[36] Louisiana [37] and probably Massachusetts [38] are in absolute accord with the holdings of the Supreme Court of the United States [39] and of the recent Kentucky case,[40] and seem to completely outweigh in reason and principle the ancient doctrine of the minority courts.

BURDEN OF PROOF IN THE DEFENSE OF INSANITY.—The term "burden of proof" has two distinct meanings. In its first sense it denotes the duty of establishing the truth of a given proposition or issue by such a *quantum* of evidence as the law demands in the case in which the issue arises. This duty is technically spoken of as the "risk of non-persuasion of the jury," and differs in civil, as distinguished from criminal cases, only in the *quantum* of evidence required. In civil cases this is a mere preponderance of evidence, while in criminal cases there must be proof beyond a reasonable doubt. As used in its other sense the term "burden of proof" means the duty of producing evidence at the beginning or

[31] See *dictum* in Bryce *v.* Burke, *supra.*

[32] Cartwright *v.* Board of Education of City of Coffeyville, 73 Kan. 32, 84 Pac. 382, an interesting case. Writ of mandamus was issued compelling the admission of a negro girl into the same room with white pupils, although there was a separate room for negroes, and the relator, the father of the girl, was alleged merely to have been a citizen of the United States and a resident of the city, where the school was located.

[33] Crawford *v.* District School Board, 68 Ore. 388, 137 Pac. 217, was decided the same way under practically the same circumstances as the Cartwright case, cited in note 32, *supra,* except that relator's children in the Oregon case were half Indian.

[34] State *v.* Francis, 95 Mo. 44, 8 S. W. 1, held that an interest by a private citizen in the enforcement of the laws was all that was necessary in order to allow the relator to sue out the writ.

[35] Richmond, etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775, citing Union Pacific R. Co. *v.* Hall, *supra,* with approval. The relator, a citizen of Henrico County, petitioned for writ to compel the street car company to allow a transfer from one car to another, without paying a second fare.

[36] State *ex rel.* Rice *v.* Judge of Marshall County, 7 Iowa 186, where there is no allegation that the relator was a taxpayer or had any special interest in compelling the performance of the acts petitioned for. This case was expressly affirmed and approved in State *v.* Bailey, 7 Iowa 390.

[37] Watts *v.* Police Jury of Carroll, 11 La. Ann. 141, where the sole ground for the application for the writ was that the relators, who lived in the parish affected, were inconvenienced by the location of the courthouse, which a statute had ordered changed.

[38] See Attorney General *v.* Boston, *supra,* where the court approved the right of an individual to sue out such a writ, even in the absence of special interest, in a matter of public concern, though the point was not involved directly in the case.

[39] Union Pacific R. Co. *v.* Hall, *supra.*

[40] State Text-Book Comm. *v.* Weathers, *supra.*

at any subsequent stage of the trial in order to make or meet a *prima facie* case. At the point where a *prima facie* case is met and overcome, the burden of proof, meaning the duty of producing evidence, shifts to the opposing party. But the burden of proof in the sense of the "risk of non-persuasion of the jury" never shifts. A knowledge of this theory of burden of proof, which is generally accepted throughout the United States,[1] greatly assists to a clear understanding of the decisions upon this subject.

Insanity [2] from time immemorial has been set up as a defense in criminal actions, and especially in cases of homicide. It has always been conceded that all men are presumed to be sane until proved to be insane.[3] But upon the question as to what is sufficient proof to overcome this presumption, to show that the defendant was not criminally responsible for his act, where the defense of insanity is interposed, there has been an irreconcilable conflict of opinion. The authorities of America and England recognize three distinct rules.[4]

I. The doctrine in England and in some of the earlier American cases is that the proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit the accused on the ground of insanity, as the proof of committing the act ought to be in order to find a sane man guilty.[5] Apart from statute,[6] this doctrine requiring the accused to prove his insanity beyond a reasonable doubt is practically obsolete.[7] It seems to have no logical justification whatever, and was probably prompted by a prejudice against insanity as a defense.

II. A large number of cases declare that the burden of proof rests upon the accused to establish his insanity by a preponderance of evidence.[8] This is the doctrine of the recent case of *Commonwealth* v. *Dale,* (Pa.), 107 Atl. 743. Although there is little strict legal reasoning or deduction from general principles evidenced in this rule, its adoption has been prompted by considerations of practical expediency and the conviction that insanity

---

[1] 1 GREENLEAF, EVIDENCE, 16th ed., § 14w; 4 WIGMORE, EVIDENCE, § 2485; Mobley *v.* Lyon, 134 Ga. 125, 67 S. E. 668, 137 Am. St. Rep. 213, 19 Ann. Cas. 1004; Supreme Tent *v.* Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137.

[2] In this paragraph, the term "burden of proof" is used to denote the duty of "the risk of non-persuasion of the jury."

[3] State *v.* Pike, 49 N. H. 399; People *v.* Myers, 20 Cal. 518.

[4] Adair *v.* State, 6 Okla. Cr. 284, 118 Pac. 416, 44 L. R. A. (N. S.) 119.

[5] State *v.* Spencer, 1 Zab. (N. J.) 196.

[6] By statute in Oregon, this rule prevails. See State *v.* Trapp, 56 Ore. 588, 109 Pac. 1094.

[7] See Graves *v.* State, 45 N. J. L. 203, in which State *v.* Spencer, *supra,* was qualified and overruled.

[8] Kelch *v.* State, 55 Ohio St. 146, 45 N. E. 6, 60 Am. St. Rep. 680; State *v.* Quigley, 26 R. I. 263, 67 L. R. A. 322, 58 Atl. 905, 3 Ann. Cas. 920; People *v.* Allender, 117 Cal. 81, 48 Pac. 1014; Phelps *v.* Commonwealth (Ky.), 32 S. W. 470. See Notes in 39 L. R. A. 738; 44 L. R. A. (N. S.) 126.

is too often invoked and too easily established as a means of escaping punishment. The reasoning of courts which have adopted this rule is thus expressed in a Rhode Island case:[9]

> "The question of guilt and the question of insanity raise two distinct issues. While both may be involved in the final verdict, the burden of proof ('risk of non-persuasion of the jury') upon each issue lies upon different parties. * * * Sanity is not an ingredient of crime. It is a condition precedent of all intelligent action. It is a quality of the actor, not an element of the act. * * * We do not infer sanity from the criminal act as we do malice and premeditation. Sanity is a premise, not a conclusion."

When insanity is alleged as a defense, it is an independent, affirmative defense and is opposed to the natural order of things. Hence this plea is treated as a plea of confession and avoidance, which concedes a commission of the homicide but puts forth new and affirmative matter, independent of the act. The burden of proving this new and independent plea is placed upon the accused.[10] It is the view of the courts which follow this doctrine that the plea of insanity is resorted to as a last extremity with the view of introducing under the latitudinous range of inquiry a multitude of facts and opinions, not directly relevant but strictly admissible, to produce confusion and doubt in the minds of the jurors and thereby interpose obstacles to the attainment of just verdicts. Hence these courts maintain that the preponderance rule is the only safe rule for society and at the same time is just to the accused, since insanity, when it exists as a fact, is readily and easily proved, and when it does not exist as a fact, is easily feigned and difficult to disprove.

In accordance with this rule the burden of proof rests upon the accused and the *quantum* of evidence required is a preponderance of evidence. But it must also be noticed that the presumption of sanity prevails until overcome by evidence and hence the accused, in addition to having the burden of proof, has to meet this *prima facie* case of sanity by producing evidence. It is therefore evident that the defendant has the "burden of evidence" as well as the burden of proof.

III. The rule adopted by many of the leading courts, including the Federal courts, is that insanity is a necessary condition to the commission of a crime; that it is an ingredient in crime as necessary as the overt act itself, without which there can be no crime. There cannot be a separation of the incidents of an offense so as to leave a part to be established by the prosecution, while as to the rest, the defendant takes upon himself the burden of proving a negative. The presumption of innocence is a shield to the de-

---

[9] State *v.* Quigley, *supra.*
[10] State *v.* Clark, 34 Wash. 485, 101 Am. St. Rep. 1006, 76 Pac. 98.

fendant throughout the proceedings until the verdict of the jury establishes the fact beyond a reasonable doubt that he not only committed the act but that he did so with criminal intent.[11] This rule, though contrary to that of the English and many of the American courts, is said to be the orthodox view.[12] According to it the burden of proof is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.[13]

In *People* v. *McCann*,[14] Mr. Justice Brown said:

> "If there be a doubt about the act of killing, all will concede that the prisoner is entitled to the benefit of it; and if there be any doubt about the will, the faculty of the prisoner to discern between right and wrong, why should he be deprived of the benefit of it, when both the act and the will are necessary to make out the crime? * * * If he is entitled to the benefit of the doubt in regard to the malicious intent, shall he not be entitled to the same benefit upon the question of his sanity, his understanding?"

The burden of proving an accused guilty is not fully discharged, nor is there any legal right to take his life until guilt is made to appear from all the evidence in the case. The plea of "not guilty" is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive ground of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty.[15] To doubt his sanity is to doubt his guilt and to doubt his guilt, if the doubt be a reasonable one, is to acquit.[16]

In so far as the burden of proof ("risk of non-persuasion of the jury") is concerned, such burden rests upon the State throughout the trial. But even under this rule account must be taken of the presumption of sanity, which overcomes the presumption of innocence in this one particular,—that it makes out a *prima facie* case and throws upon the accused the burden of evidence (duty of producing evidence) required to rebut this *prima facie* case of

---

[11] Davis *v.* United States, 160 U. S. 469; Adair *v.* State, *supra;* People *v.* Garbutt, 17 Mich. 9.

[12] 1 GREENLEAF, EVIDENCE, 16th ed., § 81a. State courts are not bound by the views of the United States Supreme Court on the question of the measure of proof and the burden of proof in criminal prosecutions where insanity is pleaded as a defense. People *v.* Allender, *supra.*

[13] Davis *v.* United States, *supra.*

[14] 16 N. Y. 58.

[15] Adair *v.* State. *supra.*

[16] State *v.* Crawford, 11 Kan. 32.

sanity and thereby shift the burden of evidence upon the State. It follows therefore that even under the orthodox rule the burden of evidence rests in the beginning upon the accused, but is capable of being shifted to the State upon raising a reasonable doubt of sanity, while the burden of proof is fixed upon the State and remains there throughout the trial.

Upon comparison of the last two rules it will be seen that they differ in one respect only,—upon the question on whom the burden of proof ("risk of the non-persuasion of the jury") rests. That this burden of proof rests upon the State, which must prove every element of a crime, including sanity, beyond a reasonable doubt, is the result of logical and consistent reasoning in accordance with well-defined legal principles. Sanity is a link in a chain of the ingredients of the crime of homicide, and when insanity breaks the chain, the existence of the crime is rendered impossible. The conclusion reached by the unorthodox rule that the burden of proof rests upon the accused appears to be the result of prejudice against the plea of insanity. Therefore it would seem that in States where this plea has worked as an obstacle to judicial machinery rather than as a means toward justice, the proper remedy is to change the orthodox rule, not by court rulings but by legislative enactment.